Supreme Court, U.S.
FILED
OCT 19 1994
OFFICE OF THE CLERK

No. 93-768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,

Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and THE STROH BREWERY COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, Milwaukee Brewery Workers' Pension Plan ("Plan"), respectfully submits this Reply Brief responding to the arguments made in Brief For Respondents.

ARGUMENT

The Plan's argument, based upon the plain language of Section 4219(c) of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), can be succinctly summarized as follows:

1. After the plan has determined the total amount of unfunded vested benefits allocated to a withdrawing employer, made any permitted adjustments to that amount and calculated the maximum annual payments which can be assessed, Section 4219(c)(1)(A)(i) of MPPAA clearly, unambiguously and explicitly instructs multiemployer plans to create a hypothetical or presumed payment schedule in order to determine the period of years over which a withdrawing employer is required to make level annual payments to the plan. 29 U.S.C. § 1399(c)(1)(A)(i);

2. In Section 4219(c)(1)(A)(i), Congress made it clear that this presumed payment schedule is separate from and does not depend upon when the employer is actually required to make payments to the plan;

3. In Section 4219(c)(1)(A)(i), Congress explicitly instructed that the withdrawing employer is required to make annual payments over the period of years necessary to **amortize** the amount of the unfunded, vested benefits allocated to the withdrawing employer according to the presumed payment schedule;

4. As Respondents concede "it is customary (if not mandatory) for an amortization calculation to include an interest component." Brief of Respondent at 20;

5. As Respondents also concede, Sections 4219(c)(1)(A)(i), 4219(c)(1)(A)(ii) and 4219(c)(1)(A)(6), when read together indicate that payments in the presumed payment schedule should reflect a factor for interest. Brief of Respondent at 20; 29 U.S.C. § 1399 (c)(1)(A)(i), (c)(1)(A)(ii) and (c)(1)(A)(6);

6. Congress did not distinguish the first payment in the presumed payment schedule from all other payments in the schedule. Accordingly, Congress did not exclude the interest factor or component from the first presumed payment;

7. In Section 4219(c)(1)(A)(i), Congress directs plans to construct a presumed payment schedule in which each annual payment, including the first payment, includes one year of accrued interest at the rates used for the most recent actuarial valuation for the plan.

8. Although actual payments are not made according to the presumed payment schedule, the withdrawing employer is required to make the number of annual payments reflected in the presumed payment schedule.

The presumed payment schedule in this case, constructed according to Congress' instructions in Section 4219(c)(1)(A)(i), is set forth at pages 28-29 of Brief For Petitioner. The Plan's reading of Section 4219(c)(1)(A)(i) is consistent with the structure, design and primary purpose of The Employee Retirement Income Security Act ("ERISA") and MPPAA. The Plan's reading of Section 4219(c)(1)(A)(i) is also consistent with the minimal legislative history which provides any genuine insight into Congress' intent on the issue.

In Respondents' Counter Statement of The Case, they accuse the Plan and the amici of submitting summaries of the statutory scheme which are unduly narrow and fail to explain the broader context in which withdrawal liability provisions operate. Brief For Respondents at 3. This observation telegraphs the weakness in Respondents' arguments. Although important and in need of resolution, the issue in this case is narrow, straightforward and can be resolved solely by reference to the clear language of the statute. The Respondents make numerous arguments and observations in an effort to distract the Court from the plain language

Congress used in Section 4219(c)(1)(A)(i) of MPPAA.[1] Although most of these arguments are not even on point, the Plan will attempt to briefly address each.

Before addressing the arguments made by Respondents, it is important to dispel two impressions Respondents apparently seek to create. First, despite having never missed a scheduled payment, Respondents concede that MPPAA required them to pay an amount in excess of the amount of unfunded benefits allocated to Schlitz and in excess of Schlitz' "withdrawal liability." While disputing the rulings made by the arbitrator, the parties agreed that those rulings reduced the amount of unfunded, vested benefits allocated to Schlitz to $23,300,000. (Brief For Petitioner at 19). In this case, pursuant to the arbitrator's rulings, Schlitz' "withdrawal liability," as that term is defined in MPPAA, was also $23,300,000. (Brief for Respondents at 21). However, Respondents have not paid the Plan only $23,300,000. Rather, as set forth in the schedule found in the Appendix to Petition for Certiorari at F-5, since Schlitz withdrew, Respondents have paid a total of $28,498,691 to the Plan.

Respondents were required to pay this amount because it is the total of the annual payments in a presumed payment schedule. The amount paid by Respondents to date is the

[1] The Respondents identify eight steps which they describe as used to calculate the amount of an employer's withdrawal liability. Brief For Respondents at 11-15. The Plan agrees generally that these eight steps, not necessarily in the order articulated by the Respondents, will provide the answer to the question how much is a withdrawing employer required to pay to the plan. These eight steps do not determine an employer's "withdrawal liability" as defined in MPPAA. It is interesting to note that the dispute in this case centers on the "amortization period" described in step number 5. Respondents make virtually no effort to describe how that period is determined.

total of all annual payments in a presumed payment schedule in which the first presumed payment was attributed entirely to reduce the amount of unfunded vested benefits allocated to Schlitz, and all remaining annual payments were attributed in part to reduce that amount and in part to the one year's worth of interest accrued on the remaining amount at a 7% annual rate. The dispute in this case is whether the first presumed payment in the schedule should have been attributed in part to one years worth of accrued interest at the 7% annual rate. If, as the Plan asserts, the first presumed payment should have also been attributed in part to interest, then Respondents should have made additional payments totaling $2,619,041 or total payments of $31,117,732 . Thus, the Court should disregard any suggestion that MPPAA does not require withdrawing employers, who make timely payments, to pay more than the amount of unfunded vested benefits allocated to the employer or more than the employer's "withdrawal liability".

In addition, perhaps in a commendable effort to find a shorthand word or phrase which describes a more complex concept, the parties and several Courts have used the word "interest" to describe the amount paid by the Respondents in excess of Schlitz' allocated share of the unfunded benefits or "withdrawal liability." This description reflects one of the reasons Congress may have required a withdrawing employer to pay amounts in addition to the employer's withdrawal liability. However, Congress did not describe the additional amount as interest. While convenient, characterizing the amount as interest is not precise and triggers several arguments from Respondents which do not focus on

the plain language of Section 4219(c)(1)(A)(i).[2] This Court is not required to characterize the required payments that are in excess of the amount of allocated unfunded vested benefits. The Court must only determine whether Congress clearly and unequivocally provided that an employer must make those additional payments.

I.

THE PLAIN LANGUAGE OF SECTION 4219(c)(1)(A)(i) REQUIRED RESPONDENTS TO MAKE ADDITIONAL PAYMENTS IN ORDER TO AMORTIZE FULLY THE AMOUNT OF UNFUNDED, VESTED BENEFITS ALLOCATED TO SCHLITZ.

Congress requires withdrawing employers to make sufficient level annual payments to **amortize** the amount of unfunded, vested benefits allocated to that employer. Congress instructs plans to construct a presumed payment schedule in order to determine how many annual payments a withdrawing employer must make. Because Congress did not distinguish the first payment in the presumed schedule from all other payments, all presumed payments must include an interest component. Because the arbitrator and the Seventh Circuit erroneously excluded the interest component from the first presumed payment, Respondents have not made sufficient payments to the Plan.

Respondents initially argue that the first payment in the presumed payment schedule should not include an interest component because Congress did not require a withdrawing employer to pay interest for the year of withdrawal. Next

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[2] Amicus Curiae, Central States, Southeast and Southwest Areas Pension Fund ("Central States") describes the amount as a necessary adjustment to correct an excessive discount. Brief of Central States at 11. Once again, the description is an effort to describe the reason for the additional payments.

Respondents argue that because the term **"amortize"** does not direct when interest is to begin, Congress could not have intended for the first payment in the presumed schedule to include an interest component. Finally, Respondents argue that the result urged by the Plan would be illogical and inconsistent with other provisions in MPPAA. Brief For Respondents at 18-27. These arguments have no merit.

A. That Congress Did Not Expressly Provide For The Payment Of Interest During The Withdrawal Year Does Not Establish That An Interest Factor Is Not Included In The First Payment In The Presumed Payment Schedule.

Respondents emphasize that in MPPAA, Congress specifically imposed interest on withdrawing employers in two instances; if a scheduled payment is late or if the employer defaults. Brief For Respondents at 18-19; 29 U.S.C. § 1399(c)(3); 29 U.S.C. § 1399(A)(5). Respondents suggest that Congress knew how to provide for accrual of interest but choose to only impose interest in the event that a required payment is not made according to the actual payment schedule. Thus, Respondents argue, because Congress did not specifically require payment of interest in the year of withdrawal, the statute does not explicitly authorize assessment of interest in that period. This argument completely misses the issue.

Section 4219(c)(1)(A)(i) contains two sentences. One long complex detailed sentence instructing plans how to construct a presumed payment schedule that is used to determine the number of level annual payments the withdrawing employer must make to the plan. This sentence is followed immediately by a short simple sentence explicitly recognizing that this presumed schedule is separate from and not dependent upon the actual payment schedule. Accordingly,

it should not be surprising that, although Congress provided for the payment of interest at the prevailing market rate on past due payments under the actual payment schedule, Congress did not utilize similar language to include an interest component in the payments reflected on the presumed payment schedule.

The withdrawing employer never makes any payments according to the presumed schedule. Therefore, it would have been inaccurate and inappropriate for Congress to explicitly provide for the payment of interest on or as part of any of those presumed payments. Accordingly, the fact that Congress did not provide for "payment of interest during the withdrawal year" does not address the question of whether the first presumed payment in the schedule used to determine the number of required payments should contain an interest component.

B. By Instructing The Plan To Amortize The Amount Of Unfunded Benefits Allocated To The Withdrawing Employer, Congress Explicitly Included An Interest Component In All Of The Payments In The Presumed Payment Schedule.

Respondents acknowledge that by using the term "amortize" in section 4219(c)(1)(A)(i), Congress intended to include an interest component in the payments reflected on the presumed payment schedule. Brief for Respondents at 20. "Certainly, it is customary (if not mandatory) for an amortization calculation to include an interest component." Brief For Respondents at 20. In fact, Congress clearly provided for interest to be included in the presumed payment schedule based upon assumptions used for the most recent actuarial valuations. 29 U.S.C. §§ 1399(c)(1)(A)(ii) and 1399(c)(6); Brief For Respondents at 20.

Thus, although Congress did not use the word "interest" in Section 4219(c)(1)(A)(i), or require a withdrawing employer to pay interest on the unpaid liability subsequent to the first presumed payment, Respondents acknowledge that the term "amortize" was sufficient to require an interest component in all payments in the presumed schedule after the first payment. It is also undisputed that in this case, each presumed payment after the first must be attributed to one years worth of interest accrued at the rate of 7% annually. Without citation to any language in the statute or rule of statutory construction, Respondents argue that although using the term "amortize" was sufficient to include an interest component in all presumed payments after the first payment, it is not sufficient to include an interest factor in the first presumed payment.

Rather, according to Respondents, Congress must have intended the first presumed payment to be applied fully to reduce the amount of unfunded, vested benefits allocated to the withdrawing employer, and all subsequent presumed payments to be partially attributed to this amount and partially attributed to interest accrued on that amount. Respondents failure to reference any statutory language supporting this distinction requires the Court to reject the argument. Even if, arguendo, the distinction were reasonable, fair or could be supported by some actuarial logic, Congress did not make the distinction urged by Respondents.

Respondents argue that the definitions of "amortize" submitted by the Plan are beside the point because they do not address when interest is to begin. Brief of Respondents at 20. This argument ignores an important part of each definition cited by the Plan. Each definition recognizes that periodic payments, which are part of any amortization schedule, are partial payment of the principal and a partial

payment of accrued interest. These definitions do not provide that only some of the periodic payments are attributable in part to accrued interest or that all but the first payment is applied in part to accrued interest. Thus, when Congress used the unqualified term "amortize" it clearly intended for all payments in the presumed schedule to include partial payment of principal and partial payment of accrued interest.[3]

C. The Definition Of "Withdrawal Liability" Is Not Inconsistent With The Plan's Reading Of Section 4219(c)(1)(A)(i).

Respondents correctly note that MPPAA defines "withdrawal liability." Brief for Respondents at 21; 29 U.S.C. § 1381(b)(1). Respondents assert that the dispute between the parties concerns whether interest for the withdrawal year is to be added to the amount of "withdrawal liability" and amortized by the scheduled payments. Brief for Respondents at 21. The Plan disagrees with this characterization. The issue is whether in Section 4219(c)(1)(A)(i), or anywhere else in MPPAA, Congress distinguished between the first payment in the presumed payment schedule and all other payments in that schedule.

In Section 4219(c)(1)(A)(i), Congress did not direct plans to calculate the period of years necessary to amortize the employer's "withdrawal liability." Rather, Congress requires withdrawing employers to make sufficient annual payments

[3] Moreover, the fact that Congress did not identify a starting point for the interest component or in any other way distinguish the first presumed payment requires the Court to reject the Seventh Circuit's observations that the statute might authorize an interest component for the period between withdrawal and the actual first payment. See, *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993).

to the plan to amortize the amount of unfunded, vested benefits allocated to a withdrawing employer after certain adjustments are made to that amount. 29 U.S.C. § 1399(c)(1)(A)(i). In this particular case, the amount which must be amortized and the amount of "withdrawal liability" are the same. However, that will not always be the case. For example, if the number of annual payments necessary to amortize the amount of unfunded, vested benefits exceeds 20, or if an adjustment under Section 1405 is required, then the amount which is amortized will exceed the employer's "withdrawal liability." Because Congress did not utilize the defined phrase "withdrawal liability" when it instructed plans how to construct the presumed payment schedule, or require the withdrawing employer to pay the amount of its "withdrawal liability" the definition of "withdrawal liability" is not relevant to the issue before the Court.

D. The Plan's Reading Of Section 4219(c)(1)(A)(i) Is Not Illogical Or Inconsistent With Other MPPAA Provisions.

Respondents next argue that it is illogical to assume Congress provided for interest on a liability which had not yet matured. Brief for Respondents at 24-25. This argument conveniently ignores that the presumed payment schedule used to determine the number of required annual payments is constructed without reference to whether the actual payment will be made before or after the first presumed payment. Respondents do not even address the Plan's observation that the liability did not magically appear but rather arises out of pre-existing obligations, and that MPPAA simply dictates a new payment schedule. *See* Brief of Petitioner at 34-35; *Huber v. Casablanca Ind., Inc.*, 916 F.2d 85, 95 (3d Cir. 1990); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 734 (1984).

If Respondents' argument were extended to its logical conclusion, they did not owe the Plan anything until the date of each required actual payment because their obligation to make those payments did not mature until that time. If interest can only accrue after a liability has matured, then Respondents should not have been required to pay any amount in excess of the unfunded, vested benefits allocated to it. In fact Respondents have already paid in excess of $5,000,000 more than Schlitz' "withdrawal liability" despite never missing or being late with a payment.

Respondents also argue that the Plan's reading is not consistent with Section 1399(c)(4), which provides for pre-payment of the outstanding amount of unpaid annual withdrawal liability payments plus accrued interest, if any, without penalty. According to Respondents, this provision is rendered meaningless under the Plan's interpretation because there would always be accrued interest, and therefore, the "if any" language in the pre-payment provision would be superfluous. Brief for Respondents at 25. This argument should be rejected for several reasons. First, Congress did not use the word "interest" to describe the amounts in excess of the allocated unfunded liabilities an employer is required to pay as a result of the presumed payment schedule established by Section 4219(c)(1)(A)(i). On the other hand, as Respondents noted, in at least two sections, Congress did specifically provide for interest to accrue. *See* 29 U.S.C. § 1399(c)(3); 29 U.S.C. § 1399(c)(5). Thus, the reference to accrued interest, if any, in Section 4219(c)(4) applies to any interest accrued on delinquent payments.

Respondents argue that pursuant to Section 4219(c)(4), they could pay the amount of their withdrawal liability on the day the first actual payment is due or the day of the first presumed payment, whichever is later, and thereby

completely satisfy their obligations to the Plan. This case does not involve those facts and, thus, the Court need not interpret Section 4219(c)(4). However, it is clear that Section 4219(c)(4) only allows an employer to pre-pay the total amount of all remaining annual payments included in the presumed payment schedule.[4] The pre-payment does not reduce the number of annual payments which must be made. It merely allows the employer to accelerate payment without additional penalty. Thus, the presumed payment provision is not inconsistent with the Plan's reading of Section 4219(c)(1)(A)(i).[5]

Respondents next argue that Congress could have chosen to start the presumed payment schedule on any day and, therefore, there is no significance to the carefully crafted language that requires the amortization period to be "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year." 29 U.S.C. § 1399(c)(1)(A)(i); Brief For Respondents at 26. Contrary to Respondents' assertions, this language is very

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[4] Respondents note testimony from one of the Plan's experts, Mr. Levy, which the Respondents assert establishes that MPPAA permits the withdrawing employer to pay in full the amount of its "withdrawal liability" in a lump sum payment on the date that the first actual payment is due. Brief For Respondents at 26. The cited testimony is not as clear as Respondents assert. Even if Mr. Levy's testimony were clear, the questions about whether MPPAA permits pre-payment of only the amount of "withdrawal liability" or requires payment of the total of all annual payments reflected on the presumed payment schedule is a question of law.

[5] Respondents correctly noted that the Court in *Huber* provided yet another meaning for the "if any" qualification in the pre-payment provision. 916 F.2d at 99. Brief For Respondents at 25 n. 27. Contrary to Respondents' assertion this interpretation is not artificial or strained.

significant in the statutory scheme. It is significant not only because it identifies the date of the first presumed payment, but it also sets the date for all subsequent presumed payments. This language directs plans to establish a presumed schedule with one year periods between the date used to calculate the amount of unfunded benefits allocated to the withdrawing employer and the date of the presumed first payment, and similar one year periods between the first presumed payment and every other payment. Equal payment periods is consistent with the requirement that the schedule reflect level annual payments. 29 U.S.C. § 1399(c)(1)(A)(i).

According to Respondents, the amortization period in this case began on November 1, 1981, the date the first actual payment was due. Brief for Respondents at 27. This argument ignores that Congress made it clear the "amortization period" is based upon the presumed schedule not the actual payment schedule. Moreover, if as Respondents assert the amortization period began on November 1, 1981, then the first period between payments in the presumed schedule would be either two months, until January 1, 1982 or fourteen months, until January 1, 1983. In either case, the period between payments is not consistent, and an amortization schedule with level annual payments cannot be easily constructed. Thus, only the Plan's reading of Section 4219(c)(1)(A)(i) gives meaning to every clause in the statute. *See* Brief For Petitioner at 37-39.

II.

THE LEGISLATIVE HISTORIES OF ERISA AND MPPAA IN GENERAL AND SECTION 4219(C)(1)(A)(i) IN PARTICULAR CONFIRM THAT INTEREST ON THE AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCATED TO SCHLITZ ACCRUES FROM THE DATE USED TO DETERMINE THE AMOUNT.

Initially, because there is no ambiguity in Section 4219(c)(1)(A)(i), there is no need to resort to legislative history. *Toibb v. Radloff*, 111 S.Ct. 2197, 2200 (1991). Respondents go to great lengths to find support in various comments for a general proposition that some sections of MPPAA actually benefit the withdrawing employer. Brief for Respondents at 27-37. None of these comments or testimony relates to the intent of Congress on the issue before the Court. From these isolated statements of individual senators, Respondents construct an argument that, even if one purpose for MPPAA is to protect the plan and remaining employers, it is not necessary to assume that every provision furthers that purpose.

It is not necessary to again repeat the observations of this Court regarding the legislative history and purpose of ERISA and MPPAA. See *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 721 (1984); *Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 569 (1985); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 212 (1986); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2271 (1993). Congress made a specific finding that withdrawals of contributing employers from multiemployer pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plans. 29 U.S.C. § 1001 a(a)(4)(A). Congress made no similar finding relating to the

impact of withdrawal liability on the withdrawing employer. Congress specifically declared it to be among the policies of MPPAA to provide reasonable protections for the interests of participants and beneficiaries of financially distressed multiemployer pension plans. 29 U.S.C. § 1001 a(c)(3) and (4). Congress did not declare it to be the policy of MPPAA to protect withdrawing employers.

As this Court has noted, MPPAA was not designed to protect withdrawing employers but, rather, to protect the plan and those employers which continue to participate in the plan. *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advance Lightweight Concrete Co., Inc.*, 484 U.S. 539, 545 (1988). Where, as in this case, there is a clear, primary purpose for a statute and no legislative history indicating that a specific portion of the statute should be construed contrary to the stated findings and purpose of the legislation, it would be inappropriate to assume Congress intended for a particular provision to be a counter-balance to the primary purpose.

Respondents conclude that the absence of any clear legislative history confirming that Congress intended to include an interest component in the first presumed payment, requires this Court to find Congress did not intend to include that component. The Plan maintains that because there is no indication in the plain language of MPPAA that Congress intended to distinguish between the first presumed payment and all other payments, because there is no specific legislative history establishing that the first payment should not include an interest factor and because the overall intent of MPPAA is to protect the plan and remaining employers, the Respondents arguments should be rejected. See *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (absent a clearly

expressed legislative intention to the contrary, language of statute is regarded as conclusive).

Respondents also argue that the Plan misreads the legislative history. The Plan noted that an example calculation of withdrawal liability which is contained in several committee reports is consistent with the Plan's reading of the statute. Brief for Petitioner at 40 n. 22. Respondents argue that this calculation at one point was correct and then became inaccurate because of a significant change in the draft legislation. Respondents suggestion that the committees reporting the bill made a significant change in the language of the bill but forgot to change the example demonstrating how the bill would apply is simply not credible.

III.

EQUITY DOES NOT FAVOR RESPONDENTS.

In what can only be described as an unusual reversal of typical roles, this Plan, with enormous funding issues affecting its participants, long-time brewery workers and their families, has based its argument primarily on the cold, clear language of MPPAA. Respondents undertake substantial efforts to argue that the straightforward reading urged by the Plan is not fair to employers. Brief for Respondent at 40-50. The Plan submits that Congress has already resolved any equitable considerations. This Court need not engage in such analysis. However, if Respondents want to raise the issue, the Record in this case speaks volumes about equity.

The direct attribution method for allocating unfunded vested benefits, attempts to match unfunded, vested benefits with the employer that received the hours of service from the employee earning the benefits Schlitz' allocated

share of unfunded benefits calculated under that method was $41,031,406. Because the direct attribution method was not in its best interest, Schlitz did not participate in a decision to amend the Plan, to select that method for calculating withdrawal liability. The lower Courts held that in the absence of a valid plan amendment, the presumptive method should have been utilized. Concluding that the selection of the methods for calculating withdrawal liability is not a fiduciary function, the Seventh Circuit endorsed Schlitz' conduct. Thus, Schlitz was able to escape lability for almost $20,000,000 in unfunded benefits earned by its former employees. The additional burden for this liability shifts to the remaining employers, potentially to the Pension Benefit Guaranty Corporation and, ultimately, to the Plan's participants and beneficiaries. This liability is for benefits which Schlitz promised, which were earned by Schlitz employees while working for Schlitz' benefit, but will not be paid for by Schlitz.

Now Schlitz speculates that any additional gap in funding caused by its interpretation of Section 4219(c)(1)(A)(i) would likely be small, and that other provisions in MPPAA which favor the Plan more than offset any funding deficiencies caused by a gap. Schlitz asserts that all actuaries overstate future liabilities and use conservative assumptions. Moreover, according to Respondents, any funding problems can be corrected overtime by increases in contributions from continuing employers. MPPAA provides one significant benefit to employers. Once they have paid the total of all annual payments in the presumed payment schedule, they no longer have any obligations to the Plan. They cannot be responsible for unanticipated events or mistakes in actuarial assumptions. The Plan has only one opportunity to calculate, according to MPPAA, a withdrawing employers fair share of liability for unfunded vested benefits. If there is any doubt about Congress' intent on the issue before the

Court, consistent with MPPAA's purpose, that doubt should be resolved in favor of the Plan not the Respondents.

CONCLUSION

The plain language of Section 4219(c)(1)(A)(i) resolves the issue in this case. All arguments which do not focus or rely on that language are red herrings. The Plan requests that the Court vacate the judgment of the Seventh Circuit on this issue and remand the case to the Seventh Circuit with instructions that it remand the case to the District Court for the purpose of calculating Schlitz' total additional liability as of that date, including pre-judgment and post-judgment interest as previously awarded by the District Court, and entering judgment in favor of the Plan in that amount.

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